

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**DAVID WESLEY**

**Plaintiff,**

**vs.**

**9:08-CV-0953 (NAM/DEP)**

**NANCY O'CONNOR-RYERSON, *Nurse*  
*Practitioner,***

**Defendant.**

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**APPEARANCES:**

**OF COUNSEL:**

David Wesley  
07-A-4840  
Auburn Correctional Facility  
P.O. Box 618  
Auburn, New York 13021  
Plaintiff, *Pro Se*

Hon. Andrew M. Cuomo  
New York State Attorney General  
The Capitol  
Albany, New York 12224  
Attorney for Defendant

Richard Lombardo, Esq.

**Norman A. Mordue, Chief U.S. District Judge**

**ORDER**

There are two matters presently before the Court: defendant's motion (Dkt. No. 9) to dismiss the complaint, and plaintiff's motion (Dkt. No. 11) for default judgment.

United States Magistrate Judge David E. Peebles has issued a Report and Recommendation (Dkt. No. 12) recommending that defendant's motion to dismiss (Dkt. No. 9) be granted in part and denied in part, *i.e.*, that plaintiff's claim against defendant in her official capacity be dismissed, and the motion otherwise be denied. Neither party has filed an objection.

Plaintiff moves (Dkt. No. 11) for default judgment on the ground that defendant has not answered the complaint. On September 24, 2008, defendant signed an acknowledgment of service; the answer was due by October 14, 2008. However, on November 17, 2008, after obtaining an extension of time to serve the answer until November 18, 2008, defendant moved (Dkt. No. 9) to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12 extends the time to answer until 10 days after notice to the defendant of the Court's ruling on the motion. *See* Fed. R. Civ. P. 12(a)(4)(A). Accordingly, plaintiff's motion is denied.

After careful review of all of the papers herein, including the Magistrate Judge's Report-Recommendation, it is

ORDERED that the Report-Recommendation (Dkt. No. 12) is hereby adopted in its entirety; and it is further

ORDERED that defendant's motion (Dkt. No. 9) is granted in part and denied in part, *i.e.*, plaintiff's claim against defendant in her official capacity is dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's motion (Dkt. No. 11) for default judgment is denied; and it is further

ORDERED that the Clerk of the Court shall serve a copy of this Order upon all parties and the Magistrate Judge assigned to this case.

**IT IS SO ORDERED.**

Dated: July 7, 2009  
Syracuse, New York

  
Norman A. Mordue  
Chief United States District Court Judge